No. 90-310 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

AMEDAY J. MIGLIORINI, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether substantial evidence supported the administrative law judge's findings that petitioner was not entitled to black lung benefits because he had failed to establish the presence of a totally disabling respiratory or pulmonary impairment.

2. Whether use of the substantial evidence standard of review in black lung appeals is improper and denied petitioner due process and equal protection of the law.

3. Whether the report of a physician retained by the Department of Labor conclusively entitles petitioner to black lung benefits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is reported at 898 F.2d 1292. The decisions of the administrative law judge and the Benefits Review Board (Pet. App. 13-38) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1990, and a timely petition for rehearing was denied on May 17, 1990 (Pet. App. 12). The petition for a writ of certiorari was filed on August 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a retired miner, applied for black lung benefits in 1974, relying on coal mine employment during the 1920s and 1930s. Pet. App. 1-2. In general, a miner is eligible for benefits if "(a) he or she is totally disabled, (b) the disability was caused, at least in part, by pneumoconiosis, and (c) the disability arose out of coal mine employment." *Mullins Coal Co.* v. *Director, OWCP*, 484 U.S. 135, 141 (1987). In this case, as in *Mullins*, the claim was subject to the Department of Labor's "interim regulations," which are found at 20 C.F.R. Pt. 727. Under those regulations, eligibility for benefits is presumed if a miner had at least ten years of coal mine employment and presents either: (1) x-ray, autopsy, or biopsy proof of pneumoconiosis; (2) ventilatory studies establishing a respiratory or pulmonary disease of a specified severity; (3) blood gas studies establishing an impairment in the transfer of oxygen from the lungs to the blood; or (4) "[o]ther medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establish[ing] the presence of a totally disabling respiratory or pulmonary impairment." 20 C.F.R. 727.203(a)(1)-(4); see also *Mullins*, 484 U.S. at 141-142. When petitioner's application for benefits was denied by the Department's Office of Workers' Compensation Programs, he requested a hearing. Pet. App. 2.

The two main issues in the proceedings below were petitioner's length of coal mine employment and whether he could invoke the presumption of eligibility under 20 C.F.R. 727.203(a)(4) based on two physicians' reports of record. In his first decision, the ALJ found that petitioner had worked in coal

mines "slightly in excess of 10 years" between 1923 and 1938, based on petitioner's own testimony that the mines had shut down for several months during the summer and that he had worked in the mines ten to twelve years altogether. Pet. App. 6, 31, 35; Tr. 8, 13-14. The ALJ further found that none of the x-ray readings in the record was positive for pneumoconiosis, and that none of the pulmonary function studies or blood gas studies demonstrated impairment under the applicable regulatory standards. Pet. App. 35-36. Accordingly, petitioner could not invoke the presumption of eligibility based on objective medical evidence under 20 C.F.R. 727.203 (a)(1), (2), or (3). Pet. App. 35-36.

The ALJ then considered two medical reports: a 1979 report by Dr. Kim, who had been retained by the Director of the Office of Workers' Compensation Programs; and a 1980 report by Drs. Sturm and Conibear, who had been retained by petitioner. Pet. App. 33-34. While both reports diagnosed chronic obstructive pulmonary disease, the ALJ concluded that neither report demonstrated total disability. Pet. App. 37. In particular, the ALJ relied on the report of Drs. Sturm and Conibear, who "only tentatively conclude[d] that [petitioner] has chronic pulmonary disease compatible with pneumoconiosis" and "conclude[d] that it does not impair normal activity." *Ibid.* Accordingly, the ALJ held that petitioner had not invoked the presumption of entitlement to benefits under 20 C.F.R. 727.203(a)(4), nor would he be eligible under the more stringent requirements of 20 C.F.R. Pt. 718 or Pt. 410. Pet. App. 37, 38.

On petitioner's first appeal to the Benefits Review Board, the Board affirmed the ALJ's conclusion that the Sturm and Conibear report did not establish a

totally disabling impairment within the meaning of 20 C.F.R. 727.203(a)(4). Pet. App. 26. However, the Board held that the ALJ had erred by failing to discuss the limitations on petitioner's ability to walk, climb, and lift described in Dr. Kim's report. *Id.* at 26-27. It therefore vacated the ALJ's decision and remanded for further consideration of Dr. Kim's report. *Id.* at 27. The Board also directed the ALJ to consider entitlement under the regulations at 20 C.F.R. Pt. 410 if he determined that petitioner could not invoke the presumption under Part 727. Pet. App. 27. Finally, the Board affirmed, as based on substantial evidence, the ALJ's finding that petitioner had worked in coal mines for slightly more than ten years. *Id.* at 28.

2. On remand, the ALJ stated that he did not give Dr. Kim's findings "much probative value" because those findings were unexplained. Instead, the ALJ credited the report of Drs. Sturm and Conibear, who "found [petitioner] able to carry on normal activities," a conclusion supported by the "objective medical testing" in the record. Thus, the ALJ again found that the evidence did not trigger the presumption of eligibility under 20 C.F.R. 727.203(a)(4). Pet. App. 22.

The Board affirmed. It rejected petitioner's claim that the ALJ was biased, and refused to reconsider its prior holdings concerning petitioner's length of coal mine employment and the effect of the Sturm and Conibear report. Pet. App. 16-17. The Board also affirmed the ALJ's finding that "there was no positive x-ray evidence of record of pneumoconiosis" to invoke the presumption under 20 C.F.R. 727.203(a)(1). Pet. App. 18. Finally, it concluded that the ALJ "could properly accord less weight to a physician's opinion [Dr. Kim's] which was not adequately

supported by its underlying documentation." *Id.* at 19.

3. The court of appeals affirmed, concluding that the ALJ's decision to deny benefits was "rational, supported by substantial evidence, and not contrary to law." Pet. App. 11. The court observed that 20 C.F.R. 727.203(a)(4) requires a "reasoned medical opinion rest[ing] on documentation adequate to support the physician's conclusions," and that "[w]hether an opinion is reasoned is the ALJ's decision." Pet. App. 7. The court then discussed the two medical opinions of record and the inferences the ALJ had drawn from each. Drs. Sturm and Conibear diagnosed chronic bronchitis "compatible with coal workers' pneumoconiosis" and a " 'work impairment * * * in that [petitioner] should not be exposed to irritant dust, fumes, gases, vapors, [and] mists,' but also considered him 'able to carry on normal activities of daily limits.' " *Id.* at 8. The ALJ interpreted the last statement as evidence that the two physicians did not find petitioner totally disabled. The court upheld this inference as permissible, noting that "[a] reviewing court cannot reject an inference made by an ALJ 'merely because it finds the opposite conclusion more reasonable.' " *Id.* at 9. Citing *Neace* v. *Director, OWCP*, 867 F.2d 264, 268 (6th Cir. 1989), and prior Board decisions, the court further held that "prohibition against work in dusty environments is not tantamount to [a conclusion] that the miner is 'totally disabled.' " Pet. App. 9. Thus, the court affirmed the ALJ's conclusion that the Sturm and Conibear report did not "establish" that petitioner was totally disabled—a point

on which the miner has the burden of proof. *Id.* at 10.[1]

While the court described the ALJ's treatment of Dr. Kim's report as "unnecessarily laconic," it held that "[t]he ALJ, as trier of fact, could rationally give greater weight to the report of Drs. Sturm and Conibear"—a report based not only on "a physical examination, symptoms, and patient history, but on an x-ray, a pulmonary function study, and blood gas readings"—than to the opinion of Dr. Kim, which was based "only on a physical examination, symptoms and work history." Pet. App. 10-11. Since "medical witness credibility is a question for the trier of fact," the court concluded that the ALJ "reasonably relied on the report of Drs. Sturm and Conibear, which he interpreted as failing to establish definitely that [petitioner] was totally disabled due to pneumoconiosis." *Ibid.* The court therefore affirmed the denial of benefits.

In a petition for rehearing, petitioner first raised his present contention that the Director was bound by Dr. Kim's report as a "judicial admission" of petitioner's total disability. The court of appeals summarily denied rehearing. Pet. App. 12.

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[1] The court also upheld the ALJ's computation of petitioner's length of coal mine employment as "slightly in excess of ten years" and the ALJ's refusal to invoke the presumption of eligibility based on the x-ray evidence. Pet. App. 5-7.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. Petitioner's eligibility for black lung benefits is a purely factual question and his legal contentions lack merit. Further review is therefore unwarranted.

1. In this routine black lung benefits claim, the record medical evidence was inconclusive and the ALJ reasonably interpreted and weighed that evidence to find that petitioner had not borne his burden of invoking the presumption of eligibility for benefits. See *Mullins*, 484 U.S. at 158-159. The record contained no objective medical evidence—*i.e.*, no positive x-rays, no qualifying pulmonary function tests, and no qualifying blood gas studies—establishing either the existence of pneumoconiosis or a pulmonary impairment sufficient to demonstrate disability. As a result, the dispute centered on two inconclusive medical reports, from which an ALJ could reasonably have inferred either that petitioner was or that he was not totally disabled.

The ALJ's reading of the Sturm and Conibear report was textually supportable and, as the court of appeals recognized, his reading may not be reversed by a reviewing tribunal just because it might have drawn a different inference from the medical evidence. See, *e.g.*, *Smith* v. *Director, OWCP*, 843 F.2d 1053, 1057 (7th Cir. 1988); *Moseley* v. *Peabody Coal Co.*, 769 F.2d 357, 360 (6th Cir. 1985). The ALJ also permissibly credited the report of Drs. Sturm and Conibear over that of Dr. Kim because the ALJ found that it was better reasoned and better supported by the objective medical evidence of record. See 20 C.F.R. 727.203(a)(4) (requiring the "*docu-*

mented opinion of a physician exercising *reasoned* medical judgment" (emphasis added)); *Mullins*, 484 U.S. at 159-160 & n.34 (ALJ should determine invocation of presumption by weighing like-kind medical evidence under a preponderance standard). Both the Benefits Review Board and the court of appeals have reviewed the record and found the ALJ's denial of benefits supported by substantial evidence. There is plainly no reason for this Court to repeat that exercise.

2. Petitioner's attack on the substantial evidence standard of review (Pet. 20-24) is frivolous. The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 921(b)(3), as incorporated by the Black Lung Benefits Act of 1972, 30 U.S.C. 932(a), expressly provides that "[t]he findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." The accompanying legislative history plainly states that the courts of appeals are to apply the same "substantial evidence" test under 33 U.S.C. 921(c). H.R. Rep. No. 1441, 92d Cong., 2d Sess. 12 (1972). The courts of appeals have uniformly applied the substantial evidence standard of review in black lung benefits appeals; the preponderance of the evidence standard applies only before the ALJ. See *Mullins*, 484 U.S. at 159-160 & n.34 (citing cases). As this Court has approved substantial evidence review of administrative agency decisions since early in this century, *e.g.*, *ICC* v. *Louisville & N. R.R.*, 227 U.S. 88, 94 (1913); *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197, 229 (1938), the constitutionality of statutes providing for such review cannot be seriously in doubt.

3. In addition to his disagreement with the ALJ's interpretation and weighing of the evidence, peti-

tioner argues (Pet. 18-20) that the findings of Dr. Kim, a physician retained by the Director, are a "judicial admission" binding on the Department that "conclusively" entitles him to black lung benefits. Petitioner cites no authority under the Black Lung Benefits Act for this novel proposition, which he raised for the first time in his petition for rehearing in the court of appeals, and it lacks merit. The Act provides that "[e]ach miner who files a claim for benefits * * * shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation" at government expense. 30 U.S.C. 923(b); see also 20 C.F.R. 725.405-725.407. However, the Act also provides that "[i]n determining the validity of claims under this part, all relevant evidence shall be considered." 30 U.S.C. 923(b). Petitioner had a right to introduce his own medical evidence (the report of Drs. Sturm and Conibear) to supplement that obtained by the Director, and the ALJ had a duty to evaluate all the medical evidence in the record regardless of its source.

Petitioner's argument also confuses the respective roles of the Director and the ALJ. Once a hearing is requested, the Director is merely a party and the ALJ is a neutral fact finder who is not bound by the Director's prior findings or determinations with respect to a claim. 20 C.F.R. 725.455(a). Thus, even if an expert witness report could be a "judicial admission" (a term limited to formal pleadings or stipulations by a party, E. Cleary, *McCormick on Evidence* § 262 (2d ed. 1972)), and even if Federal Rule of Evidence 607 had not repealed the traditional bar to impeaching one's own witnesses, the conclusions in a medical report obtained by the Director would not preclude the ALJ from giving greater weight to conflicting record evidence found to be more

persuasive. Thus petitioner's "admission" argument is without merit.[2]

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[2] Petitioner's remaining points warrant only brief comment. He argues (Pet. 25-26) that the Director did not rebut the interim presumption of eligibility, but rebuttal was never at issue because petitioner did not successfully invoke the presumption in the first place. He also contends (Pet. 27-28) that the ALJ erred in crediting him with ten rather than 16 years of coal mine employment. However, the court of appeals properly affirmed that finding based on petitioner's own testimony. Pet. App. 4-6. Finally, he argues (Pet. 27-29) that the court of appeals erred by stating that he had not pursued the ALJ's failure to evaluate his claim under 20 C.F.R. Pts. 410 and 718 on remand. Contrary to petitioner's contention, the record shows that he did not discuss Part 410 or 718 in his brief to the Board following remand, and he mentioned them only in an argument heading in his brief in the court of appeals, never explaining how the evidence would entitle him to benefits under any subsection of those regulations.

Moreover, any error with respect to the two latter contentions was harmless. The statutory presumption available with 15 years of coal mine employment, 30 U.S.C. 921(c)(4), is triggered only by medical evidence of a totally disabling respiratory or pulmonary impairment, evidence petitioner lacked. Similarly, the regulations under Parts 410 and 718 both require a miner like petitioner to prove that he is totally disabled. See 20 C.F.R. 410.410, 718.204. If petitioner could not establish such a disability under 20 C.F.R. 727.203(a)(4), he could not establish it under the other provisions either.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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